Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-95

FRED DE GREGORIO,

Petitioner,

vs.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HAROLD SMITH, as Superintendent of Attica Correctional Facility,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner petitions for a writ of certiorari to the judgment entered on the 18th day of June, 1979, in the United States Court of Appeals for the Second Circuit, affirming the judgment entered the 26th day of July, 1978 in the United States District Court for the Eastern District of New York (Pratt, J.), dismissing the petition herein for a federal writ of habeas corpus challenging the legality of petitioner's detention under color of a judgment of conviction entered on the 9th day of August, 1976 in Nassau County Court (Lawrence, J), sentencing petitioner to a term of three years on his plea of guilty to indictments pending

against him, Nassau County Court (Morrison, J.) having denied his past conviction motion, pursuant to Section 440.10 of the New York State Criminal Procedure Law, on the 21st day of February, 1978, to vacate the said judgment of conviction entered against petitioner, on grounds that the representation afforded him did not reach Sixth Amendment standards.

The opinion of the District Court for the Eastern District of New York, denying the petition for a writ of habeas corpus was not officially reported and is reproduced in Appendix A herein. The judgment of the United States Court of Appeals for the Second Circuit is reproduced in Appendix B herein. The opinion of the United States Court of Appeals for the Second Circuit was not officially reported and is reproduced in Appendix C herein.

JURISDICTION

The judgment of the Court of Appeals was entered on the 18th day of June, 1979. Jurisdiction of this Court to review the judgment of affirmance by certiorari, is conferred by 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Does the rule of the Second Circuit, which is not followed by any of the other circuit court, evaluating a charge of ineffective aid of counsel by determining whether such representation will offend Sixth Amendment standards only where it constitutes a sham and a mockery of justice that shocks the conscience of the court, meet constitutional standards?

STATEMENT OF FACTS

Petitioner was indicted by the Nassau County Grand Jury for the crimes of criminal usury and gambling. Prior to discovery on the making of any motions, petitioner retained Saul Roth, Esq. but shortly thereafter discharged him and John J. Sutter was retained. Sutter was put on notice by voluntary discovery that the evidence to obtain the indictment had been obtained by use of state court ordered electronic surveillance, which orders were renewed and amended from time to time. Nevertheless, Mr. Sutter, who made no pretrial motions on behalf of appellant, did not move, formally or informally, for discovery of the orders to seal the tape recordings, despite well defined New York State law, which prohibits the use of evidence obtained through electronic surveillance, unless the tapes have been sealed "immediately" after termination of the court ordered interception. Indeed, in *People v. Nicoletti,* 34 N.Y.2d 249 (1947), decided two years before appellant entered his plea of guilty, the New York Court of Appeals ruled that any delay of one week or upwards in sealing of tapes would be fatal to an indictment, without good cause being shown for such delay. Despite the pronouncement of *People v. Nicoletti* and notice that evidence had been gathered by court ordered electronic surveillance defense counsel still failed to move for discovery of the sealing orders, in order to determine whether a proper motion would lie to suppress the evidence against appellant.

Instead, Mr. Sutter advised petitioner to enter a plea of guilty and on May 25th, 1976, the plea was taken. On the 9th day of August, 1976, petitioner attempted to withdraw his plea, appearing with new counsel, but his application was denied. Instead, the court sentenced petitioner to a term of 1½ to 3 years. Petitioner did not take an appeal from the judgment of conviction.

Instead, petitioner moved Nassau County Court, pursuant to Section 440.10 of the New York Criminal Procedure Law to vacate the judgment of conviction against him, on grounds that he had been deprived of his Sixth Amendment right to effective aid of counsel, by reason of the latter's inertia in failing to seek discovery of the wiretap sealing orders, prior to advising petitioner to plead guilty.

During the course of the post conviction proceeding, the Nassau County District Attorney made known for the first time that there had been delay of from two weeks and upwards in sealing all of the tapes, which disclosure, as stated, was made by the district attorney for the first time during post conviction challenge to the conviction. Thus, for the first time, it appeared on record that the evidence against petitioner would have been suppressed and the indictments against him dismissed, had such disclosure been made prior to the entry of his plea of guilty. In his opposing papers in the state court proceeding, the district attorney conceded that he had not made known to the defense and defense counsel, John J. Sutter, a busy lawyer, enjoying an enviable practice, who just could not find the time to make the necessary motion to secure discovery of the sealing orders, that would have doomed the indictments against petitioner. Yet, on the other hand, the district attorney argued that petitioner had waived his right to challenge the legality of the proceedings by pleading guilty.

By order entered the 21st day of February, 1978, Nassau County Court Judge Henderson W. Morrison denied the motion without a hearing. He made findings that "the records do not indicate that the defendant or his attorneys made any pretrial application". The court also found that between plea and sentence, petitioner had indicated his dissatisfaction with John J. Sutter, by retaining new counsel, F. Courts Bouse, who was denied a continuance of the sentence proceedings in order to investigate petitioner's case.

The trial court wrestled with the problem, whether the representation afforded petitioner by John J. Sutter, who advised him to plead guilty, without taking the time, to investigate whether the wiretapping had been conducted in accordance with New York law. The court considered several factors including petitioner's prior criminal record, which the court felt, should have endowed him with a measure of sophistication in the management of his case and that a vacating of the judgment at this time would prejudice the state, by reason of the passage of five years since the investigation that lead to the indictments.

The court went on to analyze, without the benefit of a post conviction hearing, the efforts of Mr. Sutter:

> "There is no reason to assume that counsel was unaware of the potential infirmities of the People's evidence, either as a result of his own investigation, or as a result of pre-trial conferences with the prosecution. Indeed, before the defendant entered his plea, the District Attorney indicated that the reason for the generous plea offer was the People's recognition that some of the evidence available was questionable. The most that can be said, and that without assurance, is that defense counsel may have erred in not pressing more vigorously, on the record, for pre-trial disclosure. It cannot be said that any omission on the part of counsel was so glaring as to amount to a denial of the defendant's right to due process."

Petitioner exhausted his state remedies by an application to Associate Justice J. Irwin Shapiro of the Appellate Division, Second Department for leave to appeal to that court, which was denied. An appeal does not lie to the New York Court of

Appeal, where an associate justice of the Appellate Division, Second Department declines permission to appeal the denial of a motion made pursuant to Section 440.10, *supra,* to the Appellate Division.

In that posture, petitioner petitioned the United States District Court for the Eastern District of New York for a federal writ of habeas corpus, which was assigned to Hon. George C. Pratt.

The attorney general filed an affidavit in opposition, insincerely urging that petitioner should have raised the challenge to the legality of the sealing orders on a direct appeal from the conviction, without discussing how this could have been done when the district attorney never made known to the defense the content of the tapes and therefore, the trial court did not pass on the issue for review to lie.

The district court found that petitioner had duly exhausted his state remedies and that the constitutional issue was ripe for federal review. In respect to petitioner's claim that as a result of ineffective aid of counsel, the indictment had not been dismissed, Judge Pratt wrote:

> "Petitioner's motion to suppress might well have succeeded since it is now admitted by respondents here that the tapes had not been sealed immediately. See, e.g., *People v. Nicoletti,* 34 N.Y. 2d 249 (1974)."

However, Judge Pratt relied upon *Lipuma v. Commissioner,* 560 F.2d 84 (2nd Cir. 1977) to reach a conclusion that where the inefficiency of counsel deprives a state prisoner of a Fourth Amendment right, under those circumstances, federal courts will not afford a state prisoner habeas relief.

On the 18th day of June, 1979, the United States Court of Appeals for the Second Circuit affirmed the judgment of the Eastern District, reaching the constitutional issue, but ruling that the representation afforded by Sutter satisfied constitutional standards, since it did not constitute a sham or mockery of justice to shock the conscience of the court.

REASON FOR GRANTING THE WRIT

The Second Circuit rule that a conviction will not be set aside on a showing of ineffective aid of counsel, unless the representation by counsel made the trial a sham and a mockery of justice so as to shock the conscience of the court, is at odds with the standards for all other circuits and offends the Sixth Amendment.

Petitioner was indicted by the Nassau County Court Grand Jury on six separate indictments charging him with illegal possession of gambling equipment and criminal usury. He retained one Saul Roth, Esq. However, prior to discovery being afforded petitioner and before any motions were made, he discharged Roth and retained John Sutter to represent him. Sutter represented petitioner for a period of two years from April of 1974 up to the time that sentence was pronounced on August 9th, 1976. On occasion, lawyers in the employ of Sutter, such as Gino Pappa, Esq. would accompany petitioner to court, but his attorney remained John Sutter throughout. On the 25th day of May, 1976, on advice of Sutter, petitioner entered a plea of guilty to two of the indictments. Petitioner appeared for sentencing on the 9th day of August, 1976, with newly retained counsel, Martin Zevin, Esq. from the office of F. Courts Bouse, in an effort to withdraw his plea of guilty, which the court denied, sentencing him to a three year term. Neither Zevin nor Bouse had any opportunity to investigate petitioner's case and Roth had been substituted prior to any discovery or motions and so, had no participation in any of the pre-trial proceedings.

Thus, John Sutter, Esq. represented petitioner during the crucial stages of the case and so, was the attorney who had opportunity to investigate the case and interpose whatever defenses might be available to petitioner.

Prior to his advice to petitioner to enter a plea of guilty, the Nassau County District Attorney gave discovery to Sutter of copies of the orders of Nassau County Court authorizing electronic surveillance of petitioner's telephone. Sutter made no effort to request discovery of the sealing orders to determine whether they had been sealed "immediately" within the meaning of Section 700.50 of the New York Criminal Procedure Law, despite the fact that the New York Court of Appeals two years prior to petitioner's plea of guilty had held in *People v. Nicoletti,* 34 N.Y.2d 249 (1974), that an unexplained delay of as little as a week in sealing wiretapes pursuant to court order, will result in application of the exclusionary rule.

On May 25th, 1976, petitioner pleaded guilty. On August 9th, 1976, he was sentenced to concurrent three year terms. No appeal was taken. Nor was there any basis for appeal. The record did not include the orders directing the sealing of the wiretapes in the case, the only basis for a possible good faith appeal.

Following his incarceration, petitioner retained new counsel, who moved the sentencing court pursuant to Section 440.10 of the New York Criminal Procedure Law to vacate the judgment of conviction, on grounds that it was violative of his Sixth Amendment right to effective aid of counsel to recommend a plea of guilty, without first exploring the legality of wiretap sealing orders.

During the course of the post conviction proceeding, the Nassau County District Attorney made known for the first time that there had been delay of from two weeks and upwards in

sealing each of the tapes. Had such disclosure been made earlier, a motion to suppress the evidence and to dismiss the indictments would undoubtedly had succeeded.

Nevertheless, by order entered the 21st day of February, 1978, Nassau County Judge Henderson W. Morrison denied the motion without a hearing, writing that "the most that can be said, and that without assurance, is that defense counsel may have erred in not pressing more vigorously, on the record, for pre-trial disclosure." The court went on to write that "it cannot be said that any omission on the part of counsel was so glaring as to amount to a denial of the defendant's right to due process."

Petitioner exhausted his state remedies, when an associate justice of the Appellate Division, Second Department denied him leave to appeal to that court from the denial of his post-conviction motion.

Petitioner's motion for a federal writ of habeas corpus was denied, despite the following finding by United States District Court Judge George C. Pratt:

> "Petitioner's motion to suppress might well have succeeded since it is now admitted by respondents here that the tapes had not been sealed immediately. See, e.g., *People v. Nicoletti,* 34 N.Y.2d 249 (1974)."

A certificate of probable cause was issued by the United States Court of Appeals for the Second Circuit, granting petitioner leave to appeal to that court from the judgment dismissing his petition. However, that court affirmed the judgment below, holding that the representation by Sutter met constitutional standards since it did not constitute a sham and a mockery of justice.

It is patently and abundantly clear that John Sutter did not request discovery of the sealing orders for the simple reason that he did not take the time to think about their possible importance. No strategy was served by his failure to even request to examine them.

In 1949, the United States Court of Appeals for the Second Circuit set up a standard for evaluating Sixth Amendment claims for ineffective aid of counsel, that shows little respect for the degree of competency necessary to meet Sixth Amendment requirements and is certainly out of tune with modern constitutional interpretation. *Gideon v. Wainwright,* 372 U.S. 335 (1963). Thus, the court wrote in *United States v. Wight,* 176 F.2d 376 (2nd Cir. 1949):

> ". . .unless the purported representation by counsel was such as to make the trial a farce and a mockery of injustice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus. . .
>
> A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

Where counsel failed to prepare by interviewing the key witness at a trial, the Second Circuit nevertheless found that such omission did not constitute a "farce and a mockery of justice" and let a state conviction stand. *United States ex rel.Crispin v. Mancusi,* 448 F.2d 233 (2nd Cir. 1971). In short, the Second Circuit has found that the failure of counsel to prepare for trial in a criminal case does not shock the conscience of the court, and therefore does not call for federal habeas relief.

It is most significant that the Fourth Circuit, under similar circumstances found that the failure to interview and investigate witnesses in a rape case, calls for a federal writ of habeas corpus relief. The court in *Coles v. Peyton,* 389 F.2d 224 (4th Cir. 1968), defined the duties of counsel in a criminal case in positive language, rather than the negative plaudits used by the Second Circuit:

> "Counsel must conduct appropriate investigations, both factual and legal, to determine if a matter of defense can be developed, and to allow himself enough time for reflection and preparation for trial. An omission or failure to abide by these requirements constitutes a denial of effective representation of counsel unless the state, on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby." (at p. 227).

The Fifth Circuit, in *Rummels v. Estelle,* 590 F.2d 103 (5th Cir. 1979) has likewise held that counsel has "a duty to interview potential witnesses and make an independent examination of the facts, circumstances, pleadings and laws involved." Sutter did nothing but recommend a plea of guilty to an indictment that he did not even take the time out to learn whether it had been legally obtained, in accordance with New York case law.

Indeed, it would seem that the Second Circuit would withhold relief on a claim of ineffective aid of counsel, unless it could be shown that counsel came to court daily in a state of intoxication, singing barroom ballads, for only then could it be truly said that his representation constituted a "sham and a mockery of justice."

There are times that moving to suppress evidence will serve strategy, as where the likelihood of success on the motion is

remote and the risk of a denial of such motion can result in a harmful instruction to the jury that the evidence has been judicially found to have been obtained legally. Thus, in *Coco v. United States*, 569 F.2d 367 (5th Cir. 1978), the Fifth Circuit wrote:

> "Not moving for suppression is a common trial tactic. The substantial risk of an instruction from the court that the tape was lawfully obtained might be thought to outweigh the jurors speculation that this was an unlawful intrusion and any individual prejudices against an interception which lacks judicial sanction. Many lawyers prefer innuendo to inflection, particularly in areas of supposed sensitivity on the the part of jurors. We cannot say that Mr. Ragano's desire to avoid prejudicing his client in any way violated Coco's constitutional rights."

In the case at bar, however, no strategy was served by Sutter's inactivity, since his inertia had not reached the stage of challenge to the evidence, but rather stopped short of seeking discovery. No case has been found, despite search, where a court has found that counsel's election to bury his head in the sand and not try to learn about his client's case will serve strategy.

Indeed, this Court had employed language in *Tollett v. Henderson*, 411 U.S. 1602 (1973), that would seem to be at odds with the standards for testing effective aid of counsel adhered to by the Second Circuit:

> "If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not within the range of competence demanded of attorneys in criminal cases . . . . Counsel's failure to evaluate properly facts giving rise to a Constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof."

Had Mr. Sutter made a simple motion for discovery of the sealing orders in the case at bar, and realized that the two weeks and upwards delay in sealing was in violation of the rigid New York State law, the evidence against petitioner would have surely been suppressed on a motion and there would have been no need for a plea of guilty. *People v. Nicoletti*, 34 N.Y. 2d 249 (1974); *People v. Sher*, 38 N.Y. 2d 600 (1975); *People v. Scaccia*, 55 A.D. 2d 444 (4th Cir. 1977); *People v. Pecoraro*, 58 A.D. 2d 462 (2nd Dept. 1977).

What counsel failed to do in the case at bar was to properly investigate petitioner's case to determine whether any defenses might succeed in meeting it. Whether his representation constituted "a sham and a mockery of justice" should not have been the shibboleth on which to evaluate his representation. In *Scott v. United States*, 427 F.2d 609 (D.C. 1970), the District of Columbia Circuit wrote that the "farce and mockery of justice . . . standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness." In a later case, *United States v. DeCoster*, 487 F.2d 1197 (D.C. 1973), the District of Columbia wrote that "when counsel's choices are uniformed because of inadequate preparation, a defendant is denied the effective assistance of counsel . . . the 'farce and mockery' language was 'not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness' " The Second Circuit, in contrast to the others, has applied the "sham" language literally, thereby creating a nebulous barrier for the preservation of convictions caused by incompetent counsel, to the constitutional detriment of their clients, a standard which should be resoundedly criticized and struck down.

CONCLUSION

The writ of certiorari should be granted in order to accomplish uniformity among the circuits in the standard to be applied for adjudicating claims of ineffective aid of counsel in the Sixth Amendment sense. The Second Circuit stands alone in its harsh burden imposed upon a prisoner, who has been inadequately represented, to prove not only ineffectiveness of such counsel, but that his representation constituted a sham and a mockery of justice that shocks the conscience of the court. Thus, in cases such as petitioner's, where counsel has failed to investigate the case and prepare and interpose an available defense, the Second Circuit has declined to provide relief.

Uniformity is a goal to be attained among the various circuit courts and it is submitted that certiorari should be granted in the case at bar to achieve such unity, where the Second Circuit stands alone on so important and basic a constitutional issue.

Respectfully submitted,

JOSEPH A. FARALDO
Attorney for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRED DE GREGORIO,

Petitioner,

-against-

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent.

Docket No. 78 C 1154

PRATT, J:

Petitioner in this habeas corpus action, brought pursuant to 28 USC §2254, is currently incarcerated in the Attica Correctional Facility, serving a term of imprisonment of from 1½ to 3 years upon a judgment of conviction as a prior felony offender, entered on August 9, 1976 in the County Court, Nassau County, following a plea of guilty to the crimes of promoting gambling in the first degree and criminal usury.

In March of 1975, pursuant to §700 *et seq.* of the New York Criminal Procedure Law, and on application of the Nassau County District Attorney, an order issued from the Nassau County Court authorizing electronic surveillance of the petitioner based on information from an unnamed informer.

This properly authorized surveillance provided information which then justified issuance of a search warrant. Under the warrant, evidence was seized that was ultimately used to obtain six indictments against petitioner, containing 12 felony and 3 misdemeanor counts. After extensive plea negotiations, petitioner pleaded guilty to two felony counts in full satisfaction of the six separate indictments and all counts contained therein.

Although no direct appeal was taken from the judgment of conviction, petitioner did move to vacate the judgment in the County Court pursuant to NYCPL §440.10. There, as here, petitioner alleged that he had been deprived of his constitutional right to effective aid of counsel. By order entered on February 21, 1978, petitioner's motion was denied, and his subsequent application pursuant to NYCPL §460.15 for leave to appeal was also denied. His state remedies having thus been exhausted, petitioner's habeas corpus claim is properly before this court. 28 USC §2254(b)(c).

Petitioner alleged that he was denied his sixth amendment right to effective assistance of counsel because his attorney failed to make pretrial motions for discovery of the dates of the termination of electronic surveillance and sealing of the tapes, and consequently, failed to move to suppress the evidence against the petitioner. NYCPL §700.50 requires that tapes of authorized surveillance be made available to the issuing justice "immediately" for sealing. Petitioner's motion to suppress might well have succeeded since it is now admitted by respondents here that the tapes had not been sealed immediately. See *e.g., People v. Nicoletti,* 34 NY2d 249 (1974).

To support his contention that his counsel's failure to move for a suppression hearing constitutes a sixth amendment violation sufficient to entitle him to release from custody on federal habeas corpus, petitioner relies upon the decision in

United States ex rel. Rosner v. Commissioner of the New York Department of Corrections, 421 F Supp 781 (SDNY 1976). His reliance is misplaced. In *Rosner* there was a trial at which the challenged evidence was admitted; here, petitioner's guilty plea made a trial unnecessary. Moreover, *Rosner* was reversed on appeal in *LiPuma v. Commissioner, Department of Corrections, State of New York,* 560 F2d 84 (CA2 1977), on the authority of *Stone v. Powell,* 428 US 465 (1976), in which the Supreme Court ruled that fourth amendment claims are not subject to habeas corpus review unless petitioner can show that he was denied an opportunity to fully and fairly litigate his claims in the state courts. *LiPuma* held that when an alleged fourth amendment violation lies at the heart of the case, a claim "ostensibly grounded on the sixth rather than the fourth, amendment does not negate *Stone's* applicability", *LiPuma, supra,* at 93 n.6.

Although, as in *LiPuma,* the "heart" of this case is a fourth amendment claim that the evidence obtained from surveillance should have been suppressed, it is unnecessary to reach *Stone's* "full and fair opportunity" analysis here, because a guilty plea was entered. As Judge Morrison pointed out in his Nassau County court decision denying the state court motion to vacate the sentence, a plea of guilty provides only a "scanty" record:

> [T]he reviewing court is not privy to the hours of negotiation between the People and the defense counsel. Nor is it a party to the conferences between defense counsel and the defendant. Further, the Court cannot know how the defendant weighs the uncertainties of trial against the bargain offered by the People. *People v. DeGregorio,* County Court, Nassau County, 2/21/78 at 9.

It is difficult to assess the fairness of the process on such a record. Yet Judge Morrison also noted that plaintiff's plea was voluntary and knowing, and that through it plaintiff "waives certain rights and evinces, *prima facie,* an intention to forego appellate review of his conviction." *DeGregorio, supra,* at 7. See *People v. Melton,* 35 NY2d 327 (1974). The plea negotiation process here was extensive, involving 11 pretrial conferences conducted by experienced attorneys of the defendants' own chosing and resulting in a significant reduction in penal sanctions. In such a situation at least, a defendant should not be heard to complain that because the final bargain was made before other possible proceedings were undertaken, he was denied effective assistance of counsel.

Had the suppression hearing been demanded and lost, defendant's plea bargaining power might well have been greatly reduced. Considering the array of serious charges as well as petitioner's past record, his counsel appears to have succeeded in obtaining a fairly light sentence.

Clearly, petitioner's claim of a sixth amendment violation fails to meet the stringent standards the Second Circuit has established for claims of ineffective assistance of counsel. Even if petitioner's counsel may now be thought to have "erred" in not moving for suppression of evidence, "errorless counsel is not required". *United States v. Gargiulo,* 324 F2d 795, 796 (CA2 1963). Nor did conduct of petitioner's counsel make the proceedings up to and including the guilty plea a "farce and a mockery of justice". *United States v. Wight,* 176 F2d 376 (CA2 1949). See also, *Curci v. United States,* No. 77-6147 (CA2 1978); *Rickenbacker v. Warden,* 550 F2d 62 (CA2 1976).

Accordingly, petitioner's application for a writ of habeas corpus is denied and the petition is dismissed.

SO ORDERED.

Dated: Westbury, New York
July 26, 1978.

s/ George C. Pratt
GEORGE C. PRATT
U.S. DISTRICT JUDGE

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of June one thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN

HON. WILFRED FEINBERG

HON. WILLIAM H. TIMBERS

Circuit Judges,

FRED DE GREGORIO,

Petitioner-Appellant,

v.

HAROLD SMITH, as Superintendent of Attica Correctional Facility,

Respondent-Appellee.

79-2062

Appeal from the United States District Court for the Eastern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

s/ Arthur Heller
Arthur Heller
Deputy Clerk

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Decision rendered by the United States Court of Appeals for the Second Circuit has not yet been typed and will be forwarded to this Court when received.